Mohd Said Hasan Kamouna v Ferrari (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D3-22-393 OF 1996
ARIFIN JAKA J
19 JUNE 1998

***Contract** — Breach — Agreement for purchase of cars — Failure to deliver within time stipulated — Whether time is of essence of contract — Whether assurance and promise of director of defendant company constitute a separate agreement admissible to prove terms of written agreement — Whether it was the plaintiff who was in breach of contract*

The plaintiff sued the defendant, a locally incorporated car dealer, for the refund of the sum of RM276,000 ('the deposit') which the former had paid to the latter for the purchase of two Ferrari cars ('the cars'). The plaintiff had placed two orders for the purchase of the cars vide two agreements ('the agreements'). The plaintiff alleged that the defendant had committed a breach of the agreements in failing to deliver the cars to the plaintiff within the time specified in the agreements or within a reasonable time as promised by the then director of the defendant ('SP2'). In the alternative, the plaintiff alleged it was a collateral contract to the agreements that the defendant was to deliver the cars on or before the time stipulated. The defendant submitted that the date of delivery of the cars was not agreed upon and the defendant was in no position and did it ever guarantee delivery by a specific date as it had to import the cars from Italy. It further alleged that it was the plaintiff who was in breach when he failed to pay the balance purchase price upon the demand made by the defendant, and thus the defendant was entitled to forfeit the deposit.

Held, allowing the plaintiff's claim:

The assurance and promise of SP2 constitute a separate agreement which exists side by side with the principal agreements entered into between the parties. It is the intention of the parties on the evidence that the stipulation as to the time of delivery of the cars is an essence of the agreements. It was clear in this case that this term was not complied with (see p 646E); *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16 followed.

Moreover, the demand by the defendant was inconsistent with the expressed terms of the agreement and with the usual practice of the defendant; thus it could not be said that it was the plaintiff who had breached the agreement. On the other hand, the facts showed that it was the defendant that was unable to fulfill its obligations to deliver the cars within the time stipulated. It had thus committed a breach of the agreements. Furthermore, the plaintiff is entitled to a refund of the deposits if no stock is available after 18 months from date of down payment of deposit (see pp 647E and 648F).

A [**Bahasa Malaysia summary**

Plaintif menyaman defendan, peniaga kereta yang diperbadankan secara tempatan, untuk pengembalian jumlah sebanyak RM276,000 ('deposit tersebut') yang plaintif telah bayar kepada defendan untuk membeli dua buah kereta Ferrari ('kereta-kereta tersebut'). Plaintif-
B plaintif telah membuat dua tempahan untuk membeli kereta-kereta tersebut melalui dua perjanjian ('perjanjian-perjanjian tersebut'). Plaintif mengatakan bahawa defendan telah melanggar perjanjian-perjanjian tersebut kerana gagal untuk menghantar-serah kereta-kereta tersebut kepada plaintif dalam masa yang ditetapkan oleh perjanjian-perjanjian tersebut atau dalam tempoh masa yang
C munasabah seperti yang dijanjikan oleh pengarah defendan pada ketika itu ('SP2'). Secara alternatif, plaintif mengatakan terdapat kontrak kolateral kepada perjanjian-perjanjian tersebut bahawa defendan hendaklah menghantar-serah kereta-kereta tersebut pada atau sebelum masa yang ditetapkan. Defendan berhujah bahawa
D tarikh hantar-serah kereta-kereta tersebut tidak dipersetujui dan defendan tidak berada dalam kedudukan untuk menjamin hantar-serah pada tarikh yang spesifik kerana ia perlu mengimport kereta-kereta tersebut dari Itali. Adalah selanjutnya dihujahkan bahawa plaintif telah melanggar perjanjian apabila beliau gagal membayar baki harga beli apabila dituntut oleh defendan, dan dengan itu
E defendan berhak merampas deposit tersebut.

Diputuskan, membenarkan tuntutan plaintif:

Jaminan dan janji yang diberikan oleh SP2 merupakan perjanjian yang berasingan yang wujud bersama dengan perjanjian utama yang
F diikat oleh pihak-pihak. Adalah menjadi niat pihak-pihak atas keterangan bahawa penetapan tarikh hantar-serah kereta-kereta tersebut adalah intipati kepada perjanjian tersebut. Adalah jelas dalam kes ini bahawa terma ini telah tidak dipatuhi (lihat ms 646E); *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16 diikut.

G Tambahan pula, tuntutan defendan tidak konsisten dengan terma nyata perjanjian tersebut dan dengan amalan biasa defendan; oleh itu tidak boleh dikatakan bahawa plaintif yang telah melanggar perjanjian. Sebaliknya, fakta-fakta menunjukkan bahawa defendan tidak berupaya untuk memenuhi obligasinya untuk menghantar-serah
H dalam masa yang ditetapkan. Dengan itu ia telah melanggar perjanjian. Selanjutnya, plaintif berhak kepada pengembalian deposit jika tiada stok selepas 18 bulan daripada tarikh bayaran deposit (lihat ms 647E dan 648F).]

I **Notes**

For cases on breach of contract, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1611–1693.

Cases referred to

Bunge Corp New York v Tradax Export SA Panama [1981] 1 WLR 711 (refd)

Tan Chong & Sons Motor Co Sdn Bhd v Alan McKnight [1983] 1 MLJ 220 (refd)

Tan Swee Hoe Co Ltd v Ali Hussain Bros [1980] 2 MLJ 16 (folld)

Legislation referred to

Evidence Act 1950 ss 91, 92

Sales of Goods Act 1957 s 11

Kumar Kanagasabai (*Shearn Delamore & Co*) for the plaintiff.

Phillip Raj (*Skrine & Co*) for the defendant.

Arifin Jaka J: By a writ issued on 12 June 1996, Mohd Said Hasan Kamouna ('the plaintiff'), who resided in Paris at the material time and now in the United Kingdom whose address is Flat 2, 49 Holland Park, London sued Ferrari (M) Sdn Bhd, a locally incorporated company having its registered address at First Floor, 27 Jalan Tun HS Lee, Kuala Lumpur ('the defendant'), for the refund of the sum of RM276,000 and interest thereon, general damages and costs. The amount claimed represents the deposit the plaintiff had paid to the defendant for the purchase of two Ferrari cars.

The facts which are not disputed are that the plaintiff placed an order for the purchase of a Ferrari Testerossa car ('the first car') vide an agreement to buy dated 12 June 1989 executed by him ('the first agreement'). He also ordered another car of the same make in the name of his friend Konstantinos Padazo Poulos vide another agreement to buy also dated 12 June 1989 ('the second agreement'). This car was also meant for him. The purchase price of each car was RM457,000. A deposit of RM138,000 for each car was paid by the plaintiff on 12 June 1989 vide Cashier Order No 161978 and Cashier Order No 161979. However, sometime around the later part of June 1989 at the request of the defendant, one Saliza Norali Datuk Nordin ('Saliza') replaced Konstantinos as the purchaser under the second agreement on the same terms and conditions as stated therein. The purchase price of the car remained at RM457,000. With consent of the defendant, the deposit of RM138,000 paid earlier to the defendant under the second agreement was transferred as deposit and part payment of the purchase price of the car bought under the name of Saliza. Later, at the end of September 1989, on the instructions of the plaintiff and with the consent of the defendant, the terms of the second agreement was varied by replacing the Ferrari Testerossa with a Ferrari 348ts ('the substitute car').

In the statement of claim, the plaintiff alleged that it was an essential term of the agreements that the defendant was to deliver to the plaintiff the first car on or before 12 June 1990 and the substitute car by the end of 1990 as represented, promised and agreed by the defendant's director at the material time, Mohd Tharit bin Ismail Bakti. Further and in the alternative, the plaintiff alleged it was a collateral contract to the first

agreement that the defendant was to deliver the first car on or before 12 June 1990.

It is further alleged by the plaintiff that the defendant had committed a breach of the first and second agreements in failing to deliver the first and the substitute car to the plaintiff within the time stipulated as specified in the first and second agreements or within a reasonable time. The plaintiff also alleged in the alternative that the defendant was to refund the deposits within 18 months of the payment of the deposits in the event that there was no stock available.

The defendant does not dispute that the plaintiff contracted to purchase the cars and that the sum of RM276,000 as deposit for both the cars were paid by the plaintiff and received by the defendant. The defence of the defendant in essence is that the date of delivery of the cars was not agreed upon and the defendant was in no position and did it ever guarantee delivery by a specific date as it had to import the cars from Italy. All that was agreed upon was a tentative date of delivery which was in the last quarter of 1990. It further alleged that it had not breached the agreements but maintained that it was the plaintiff who was in breach when he failed to pay the balance purchase price of RM319,000 in respect of the first car and RM219,000 in respect of the substitute car 60 days prior to delivery. As a result of the plaintiff's failure to pay the balance purchase price, the defendant alleged that it is entitled to forfeit the deposit.

The issues to be decided are:

(a) whether the time for delivery of the cars are specified, in other words whether time was an essence of the agreements; and

(b) whether the defendant had breached the agreement in which case it has to refund the deposit to the plaintiff as claimed.

I shall now deal with the issues raised.

Whether time for delivery is specified

The learned counsel for the plaintiff submitted that it is a condition of the agreement that the cars would be delivered to the plaintiff within the time stipulated therein, ie on 12 June 1990 in respect of the first car and by the end of 1990 in respect of the substitute car from the date of payment of the deposits.

The learned counsel for the defendant on the other hand submitted, that there is no express term in the agreements that the cars would be delivered by a specific date. The learned counsel stressed that no where in the agreements is there any reference to 12 June 1990 being the date of delivery of the first car and on or before the end of 1990 being the date of delivery of the substitute car or for that matter any reference to a date of delivery at all.

Section 11 of the Sales of Goods Act 1957 provides that a stipulation as to time of payment are not deemed to be of the essence of a contract of sale unless a different intention appears from the terms of the contract.

Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

The question that arises is whether there is a stipulation as to time of delivery of the cars in the agreements in this case. Both counsels agree that this depends on the terms of the agreements. What then are the terms of the agreements with regard to time of delivery? The agreements entered into between the plaintiff and the defendant do not contain the term concerning the time of delivery. However, there is evidence that the plaintiff relied on the assurance and promise given by Mohd Tharit bin Ismail Bakti ('SP2') who was the manager and director of the defendant at the material time. The plaintiff said in his evidence that SP2 was the only person from the defendant company he dealt with when he purchased the cars. The plaintiff said that while on a holiday in Malaysia in June 1989, he visited the defendant company and met SP2. The plaintiff enquired whether it was possible for him to order two Ferrari cars and whether it was possible to have the cars delivered in London. He further testified that he emphasised on the time of delivery. SP2 assured and promised the plaintiff to deliver the cars within 12 months from the day the order was made. The plaintiff said that time of delivery was important to him because there was always a delay in delivery of cars purchased in England which would take about seven years. Relying on the assurance and promise of SP2, the plaintiff entered into the agreements to purchase the cars.

SP2 in his evidence corroborated the evidence of the plaintiff by saying that he told the plaintiff the cars would be delivered within one year from the time the deposit was paid. He said on 16 June 1989 he wrote a letter (p 7–AB) to the secretary of Albert Tan, the supplier of the first car in Singapore. It is clearly stated in the letter (see the third name therein) that the plaintiff had paid a deposit in the sum of RM138,000 on 12 June 1989 for the purchase of a Ferrari Testarossa with particulars of the body and interior colours. It is important to note that delivery date stated therein is one year. As regards the substitute car, SP2 wrote a letter dated 25 September 1989 (p 9–AB) advising the supplier in Singapore of the change of the order form Ferrari Testerossa to Ferrari 348 ts. It is also important to note that it is specifically stated in the letter 'delivery by end of 1990'. SP2 also said that after he received confirmation of the delivery time from his supplier, he informed the plaintiff that delivery of both cars would be made within one year from the date of payment of the deposit.

It was submitted by the learned counsel for the defendant that the time for delivery was not fixed. The defendant only said that it could not have agreed to fix a definite date of delivery of one year on the grounds that:

(a) The written agreements do not in any way whatsoever identify either a date of delivery or a date of delivery of 12 June 1990.

(b) Exhibit P1 shows that the delivery for the first car was 24 months.

(c) The plaintiff stated the expected date of delivery to be 31 December 1990.

(d) The question of a definite time for delivery was not uppermost in the plaintiff's own mind as, within a period of three months after he entered into the agreements, he changed the order in respect of one car from Testerrosa to Testerossa 348ts.

I agree with the learned counsel for the plaintiff that it is irrelevant that the defendant would not have agreed to a definite date of delivery for the reasons professed or for any reasons for that matter. The important fact is that the defendant did agree to a definite time of delivery of the cars.

The defendant did not and could not deny that the oral assurance and promise was made by its manager and director who is a person with authority. The assurance and promise was given in the course of negotiation resulting in the signing of the two agreements. The plaintiff relied on the assurance and promise which was later reduced into writing in the letters dated 16 and 29 June 1989 from SP2 to the supplier of the cars in Singapore which categorically states 'delivery due — one year' and 'delivery — one year' respectively. The plaintiff said that he would not have placed the order if he was told that delivery of the cars would take more than a year. It must be borne in mind that SP2 was a manager and director of the defendant at the material time. He had both ostensible as well as actual authority to make the promise and representation that the cars would be delivered as specified in the agreements on behalf of the defendant. What he said and did must be taken to be said and done on behalf of the defendant.

In *Tan Chong & Sons Motor Co Sdn Bhd v Alan McKnight* [1983] 1 MLJ 220 at p 228G, Salleh Abas FJ (as he then was) had this to say on such representation:

> ... It would lead to a great mischief in the law and certainly would not be in the interest of business efficacy if representations made by a salesman in the course of his employment could not be relied upon by an intending purchaser whom he was dealing with.

On the evidence and under the circumstances of this case, the plaintiff was entitled to rely on the assurance and promise of SP2 and the defendant is therefore bound by the assurance and promise as to the time of delivery of the cars.

The next question to be considered is whether the assurance and promise is admissible. The assurance and promise being oral in nature would attract the question whether they are admissible to vary or qualify the terms of the written agreements entered into between the plaintiff and the defendant. Sections 91 and 92 of the Evidence Act 1950 state in effect that extrinsic evidence is not admissible to vary or qualify the terms of a written contract. The law on the issue of admissibility of such evidence was stated with the utmost clarity in *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16 at p 18 by Raja Azlan Shah CJ Malaya (as His Majesty then was) as follows:

> Although it is trite law that parol evidence is not admissible to add to, vary or contradict a written agreement, a technical way of overcoming the rule is

by invoking the doctrine of collateral contract or collateral warranty. *Chitty on Contracts* (24th Ed) (para 674) put it this way: A

> 'An assurance given in the course of negotiation may therefore give rise to a contractual obligation, provided that an intention to be bound can be shown. The rules of evidence, however, frequently prevent such an assurance from being incorporated as part of a subsequent written agreement, since extrinsic evidence is as a general rule not admissible B to vary or add to the terms of a written contract. As a result, the courts have been prepared in some circumstances to treat the assurance as a separate contract, collateral to the main transaction. In particular, they will do so where one party refuses to enter into the contract unless the other gives him an assurance on certain point.'

C

After referring to a number of cases, his Lordship concluded at p 19:

> In our view, those cases are strong authority for the proposition that an oral promise, given at the time of contracting which induces a party to enter into the contract, overrides any inconsistent written agreement. The devise of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead, it constitutes D a separate contract which exists side by side with the main agreement.

On the authority of *Tan Swee Hoe*'s case, I hold that the assurance and promise of SP2 constitute a separate agreement which exists side by side with the principal agreements to purchase entered into between the parties. Time for delivery of the cars were stipulated in the letters dated 16 June E and 25 September 1989 which I had referred to in this judgment earlier. I am of the view that it is the intention of the parties on the evidence that the stipulation as to the time of delivery of the cars is an essence of the agreements.

In *Bunge Corp New York v Tradax Export SA Panama* [1981] F 1 WLR 711, it was held by the House of Lords that the court required precise compliance with stipulations as to time wherever the circumstances of the case indicated that would fulfill the intentions of the parties and that, in general, time was of the essence in mercantile contracts.

The learned counsel for the defendant also raised the issue and G contended that the stipulation of time for delivery, being tentative, was merely a warranty as opposed to a condition. With respect, I disagree with this contention. The evidence proves otherwise. The plaintiff said that time was important to him otherwise he would not have bought the cars. There is no merit on this contention.

The learned counsel for the defendant also argued that the plaintiff H has waived the stipulation as to time. This was never pleaded. It is trite that parties are bound by their pleadings. On this ground, the issue should not be considered by this court

On the totallity of the evidence, and after carefully considering the submission of counsels for both parties, I hold that time for delivery of the I cars was an essence of the agreements to be entered into between the plaintiff and the defendant.

Whether the defendant was in breach

The learned counsel for the plaintiff submitted that the defendant has breached the agreements by its failure to deliver the cars within the stipulated time of delivery as agreed by the parties. Based on my finding that time is an essence of the agreements, it is in evidence that the defendant has failed to deliver the cars within the stipulated time. The defendant argued that it was the plaintiff who had breached the agreement by his failure to pay the balance purchase price as demanded by the defendant vide its letter dated 12 March 1992. By this letter, the defendant demanded for the balance purchase price to be paid within seven days of receipt of this letter and delivery would be made within sixty days. The demand itself is not in compliance with the expressed terms of the agreement.

Clause 2(a) of the agreements state as follows:

> The buyer shall take delivery within seven days of the issue to him by the seller (or any other authorized person) of the appropriate invoice delivery order or written advice of arrival.

It is also stated that payment must be settled before delivery.

There is no evidence to show that the defendant had given the plaintiff the invoice, delivery order or written advice of arrival. The demand was inconsistent with cl (2)(a) and with the usual practice of the defendant. In the letter itself, the defendant said that ordinarily the customer would have been informed that his car is ready and would then be required to pay the balance of the purchase price.

The defendant claimed that the plaintiff had failed to pay the balance purchase price as demanded and was therefore in default and the defendant was entitled to forfeit the deposit. I cannot accept that this is the situation in the instant case. The real situation, to my mind from the evidence, is that the defendant was not in a position to deliver the cars within the time stipulated. The evidence given by the plaintiff shows that the defendant never contacted the plaintiff for payment or delivery of the cars in 1990 or 1991. The defendant's witness D2 testified that he wanted to trace the purchaser because the supplier told the defendant that the car was available for delivery. He said he wrote to the plaintiff (see D2 and D3) on 21 September 1990 requesting the plaintiff to contact him to discuss about the cars. It is to be noted that the letters were sent to the plaintiff at addresses which are not as stated in the agreements. Surely, it cannot be expected that there would be any response from the plaintiff. The letters would never reached him. D2 could have contacted SP2 to ensure that the plaintiff could be contacted.

There is evidence that the plaintiff tried to contact the defendant on numerous occassions by phone after SP2 had resigned. He testified that he left massages and his contact number with the defendant and yet there was no response from the defendant.

SP2 also testified that it is the practice of the defendant to make a request for payment of the balance purchase price only after the chassis number is available.

No evidence was adduced as to the chassis numbers of the cars. Under these circumstances, I am not satisfied that the defendant was able to fulfill his obligations to deliver the cars within the time stipulated. It has therefore committed a breach of the agreements.

The plaintiff also contended that by the express terms of the conditions of sales under the agreements the deposit paid by the plaintiff is refundable in the event no stock is available 18 months from the payment of the deposit, ie by December 1990 in the case of the first car and in March 1991 in the case of the substitute car.

Clause 4 of the conditions of sales states:

> Deposits are not refundable in the event of cancellation or annulment of this agreement unless no stock is available after 18 months from date of down payment of deposit.

Were the cars available 18 months after the payment of the deposits? There is no evidence to show that the cars were available then. The plaintiff kept on waiting for the cars until he was fed up of waiting. This prompted him to instruct his solicitors to write the letter dated 7 February 1992 demanding for the refund of the deposit totalling RM276,000. The plaintiff had done the right thing under the circumstances. In response to this letter, the defendant's solicitors wrote on 12 March 1992 requesting for payment of the balance purchase price. As I had stated earlier in this judgment, this response is not in compliance with the expressed terms of the agreement. As at March 1992, I am convinced on the evidence that the cars were not available for delivery. On this ground alone, the plaintiff was entitled to terminate the agreements as no cars were available 18 months after payment of the deposit and was entitled to a refund of the deposit.

Summary

On the totality of the evidence and after considering the submission of the counsels for both parties and for the reasons I have stated above, I find that it is as clear as a summer's day that the defendant had committed a breach of the agreements in failing to deliver the cars within the time stipulated.

I therefore allow the plaintiff's claim and order the defendant to pay the sum of RM276,000 to the plaintiff, interests thereon at the rate of 8% pa from 7 February 1992 to date of full payment and costs. I make no order as to general damages claimed by the plaintiff as no evidence was adduced on the issue.

Plaintiff's claim allowed.

Reported by Loo Lai Mee